No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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OPINION BELOW.

The District Court wrote no opinion.[1]

JURISDICTION.

On February 27, 1952, a four-count indictment was ed against appellant in the United States District urt for the Northern District of California charg-

[1] This was the second trial and conviction in this case. The mer conviction was reversed by this court in *Olender v. United tes*, 210 F.2d 795.

ing wilful attempts to evade his own income taxes and those of his wife for the calendar years 1945 and 1946, in violation of Section 145(b) of the Internal Revenue Code. (R. 3-7.) Jurisdiction was conferred on the District Court by 18 U.S.C. Section 3231.

After a jury trial appellant was found guilty as charged (R. 7); sentence was imposed and judgment was entered on August 23, 1955. (R. 8-10.) Notice of appeal was filed on August 23, 1955. (R. 10-11.) The jurisdiction of this court is invoked under 28 U.S.C. Section 1291.

QUESTIONS PRESENTED.

1. Whether the trial court erred in denying appellant's motion for judgment of acquittal made at the conclusion of all the evidence in the case.

2. Whether the evidence was sufficient to support the verdict on each count of the indictment.

3. Whether the trial court erred in admitting in evidence the rebuttal testimony of John Sanchirico and exhibits 66 to 71, inclusive.

STATUTE INVOLVED.

Internal Revenue Code:

Sec. 145. Penalties.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required

under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

STATEMENT.

The four count indictment charged appellant with wilfully attempting to defeat and evade a large part of his own and his wife's income taxes, computed on the community property basis. The first and second counts charged him with filing false returns for the year 1945 in which he stated he and his wife had a net income of $41,067.61 on which the taxes amounted to $15,495.75, whereas he knew that their net income for the year was $67,982.22 and that the taxes due amounted to $32,517.74. The third and fourth counts charged that he filed false returns for the year 1946 in which he stated that their net income was $23,514.62 on which they owed income taxes of $5,562.79, whereas he knew that they had a net income of $46,042.43 and owed taxes amounting to $15,922.38. (R. 3-6.) After being convicted on all counts (R. 7) appellant was sentenced to three years' imprisonment on each

count, to run concurrently, and fined $10,000 on count 1 and $10,000 on count three, a total of three years and $20,000. (R. 8-10.)

Prior to trial, since the government's case was based upon increases in net worth, counsel entered into a stipulation covering most of appellant's assets and liabilities at the close of 1944, 1945, and 1946. (R. 129-142, Ex. 11, 11a.) At the trial the chief disputed issues of fact were:

1. The amount of cash, if any, in the safe deposit boxes of appellant as of December 31, 1944, 1945 and 1946.

2. Whether bonds purchased by appellant and in his possession on December 31, 1944 in the amount of $20,000 belonged to him or his mother.

3. Whether appellant was entitled to be credited with $20,550 as of December 31, 1944, as the value of sailor suits purchased early in 1944 from Goodman and not shown on appellant's closing inventory for the year 1944.

4. Whether a cashier's check of $7,724 purchased in 1945 and not paid until March, 1946, should be included as an asset of appellant at the end of 1945.

The evidence to support the verdict may be briefly summarized as follows:

During the years 1944 to 1946, appellant was sole proprietor of the Army and Navy Store, 1026 Broadway, Oakland, California (R. 46, 96, 148, 550) dealing in military supplies and uniforms and camping equip-

ıent. (R. 96, 550.) He employed a bookkeeper about n hour a day, 3 or 4 days a week. (R. 593.)

Appellant prepared his own tax return for 1945 and 946 and for many years before, as well as preparing ax returns for relatives, employees and friends. (R. 4, 630-631.) He is a graduate of the University of 'alifornia, where he studied accounting, and auditing. R. 630.)

The store records consisted of a cash receipts and isbursements book, a general ledger or general jour- al and purchase register or accounts payable register. R. 101.)

During 1947 Treasury Agent Blanchard called on ppellant and asked him if he had done any business vith George Goodman Sales Agency (hereinafter re- erred to as Goodman) which was then under in- estigation. (R. 47, 50-52, 66.) Appellant thereafter roduced a check to Goodman for $1,380 and an in- oice (Exhibit 9) and said that he had been trying o get sailor suits from the east, but this was the only ransaction with Goodman he could find in his books R. 52, 68-69) or that he had had. (R. 70.)

In the course of investigation at the Bank of Amer- ca in Oakland, Blanchard discovered nine cashier's hecks, totaling $20,550, purchased by appellant in 'anuary, 1944, with currency, and payable to Good- nan. (R. 55, Ex. 6.) Blanchard questioned appellant bout these checks and appellant acknowledged that he purchase applications were in his handwriting, ut he had no recollection of having purchased the

checks or having received merchandise for them. (R. 88-91, Ex. 8 and 9, cf. 745-750.)

In December, 1947, as a result of Blanchard's further checks of express company records which reflected the receipt of merchandise shipped to appellant by Goodman in January and February, 1944, and Treasury currency reports showing unusual currency transactions, Revenue Agent Root began investigation of appellant's income tax returns for 1944 and 1945. (R. 93-94, 103-104, 305-312, 788-793, Ex. 29.) After examining the store books for several days Root was unable to find any record of the Goodman transactions on the books. (R. 104.) Appellant was still unable to recall the transactions. (R. 104.) Appellant also failed to produce records of a partnership in Fresno, records of rental property or records of government bonds. (R. 106.) Nor could store sales be verified from tapes. (R. 122-123.)

Root then informed appellant that in view of the record of cashier's checks purchased; the express company records showing receipts of merchandise from Goodman; and the record of cash transactions, he would like a comparative net worth statement for each year from January 1, 1942, to December 31, 1947. (R. 107, 119-210.)

Appellant then employed Sargent & Co., certified public accountants to prepare a net worth statement and was turned over to Charles R. Ringo, a partner. (R. 144-146.) Ringo attempted unsuccessfully to prepare a yearly net worth statement from bank records, Army and Navy store books, and questioning of ap-

pellant. (R. 146-152, 156-157.) He asked appellant for an estimate of his net worth at the end of each year and prepared questions to ask him. (R. 147, 157-159.) Exhibits 17 and 18, in appellant's handwriting are estimates of his assets and liabilities as of January 1, 1942, and January 1, 1948, respectively. (R. 157-159.) Similar statements submitted to Ringo for the intervening years were returned to appellant and were not available at the trial (R. 159), but Ringo had prepared a summary of the information on those statements. (Ex. 19, R. 163-168.) The summary (Ex. 19) showed cash in vault of $75,000 on December 31, 1941 and 1942; $69,000 on December 31, 1943; $50,000 on December 31, 1944; $7,200 on December 31, 1945, and none on December 31, 1946. (R. 166-167.)[2] These amounts were supplied by the appellant from memory as he had no records. (R. 243-246.)

After Ringo prepared a preliminary net worth statement he went over it with appellant and appellant then informed him of an additional asset of a single premium life insurance policy costing $15,333.46 in 1945. (R. 187-188, 250-251.) Ringo told appellant that this would increase income and throw the net worth out of balance, and appellant then asked him to leave $5,000 in stock of Asturia Corporation off the statement.[3] (R. 188-191, 251-252, 278-284, 303-304.)

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[2]The amounts of cash disclosed by Ex. 19 were used in the government's net worth statement. (Ex. 50, printed in appendix to appellant's brief.)

[3]Appellant actually invested $10,000 in stock and loans to Asturia's Corporation, but only $5,000 was disclosed to Ringo. (R. 192, 324-325.)

Appellant thereafter went to Fresno and returned with a list of alleged gifts from his mother, Mrs. J. Olender, during the period 1942 to 1948, totaling $10,500 which Ringo included in the net worth statement. (R. 191-192, Ex. 10.)[4]

Ringo also testified that in the course of preparing the net worth statement he inventoried appellant's safety deposit boxes and saw $33,000 worth of bearer or coupon government bonds, only $13,000 of which were included in appellant's assets on the net worth statement, Exhibit 10. (R. 220-222.) He stated that he had some reason to indicate that the $20,000 balance of bonds belonged to appellant's mother, but he couldn't remember what it was. (R. 221-222.) Ringo admitted that he had prepared appellant's 1947 tax return, and that interest of $1,225 on the total bond holdings of $33,000 had been reported in that return. (R. 223-226.)

Appellant submitted the net worth statement (Ex. 10) prepared by Ringo to Agent Root and swore to it under oath as a true, correct and complete statement on September 13, 1948. (R. 108-110.) Thereafter, on October 12, 1948, Special Agent Whiteside was assigned to work with agent Root in the investigation. (R. 403.)

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[4]Records of the bank accounts of appellant's mother in the Bank of America, Fresno. California, disclose withdrawals on the dates and in the amounts of the claimed gifts to appellant. However, the withdrawals were traced by deposit slips and ledger cards to other accounts of Mrs. Olender or to the account of Terry Olender Gambord, appellant's sister. There were no similar withdrawals in amount or dates which might have been turned over to appellant. (R. 366-381.)

Whiteside discovered that there had been left off the net worth statement (Ex. 10) a bank account in the name of appellant's wife;[5] investment in Asturia's Corporation of $5,000; and jewelry, furs and other personal effects purchased during 1945 and 1946. (R. 403-404, 406, 422.) Expenditures for such non-deductible personal items were established at the trial, in addition to amounts stipulated, to be $125.49 for 1945 and $4,335.04 for 1946. (R. 199-205, 207-210, 212-219, 317-319, 349-355, Ex. 23, 26, 27, 30.)

During his employment Ringo prepared an analysis of the Army and Navy store net worth from the books, taking into consideration the inventory on hand at the end of each year, as shown by the records. (R. 184-187, Ex. 22.) The year-end merchandise inventory so shown was stipulated to be $84,011.26 on December 31, 1944; $83,394.64 on December 31, 1945, and $57,449.59 on December 31, 1946. (R. 130, 184-187.) Appellant did not advise Ringo that he had any transactions which did not result in profit, and did not inform him of any stock on hand during 1944 and 1945 which was not included in the inventory records. (R. 275-277.)

On the basis of the stipulation (Ex. 11, 11a) and the evidence it had presented, the government submitted a computation of appellant's net worth as of the last day of the years 1944, 1945 and 1946. (Ex. 50 printed in Appellant's Brief, Appendix, page i.) The

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[5]The bank account of Mrs. Betty Olender, in the Bank of America, Oakland Main Office, was stipulated to have the following year and balances: (R. 134) 1944—zero; 1945—$5,000; 1946—$10,070.60.

government allowed $50,000 cash in vault as of the starting point, December 31, 1944. This was based on appellant's statements to Ringo that he had $75,000 cash in a vault on December 31, 1941, which had been decreased by December 31, 1944, by withdrawals of $10,000 deposited to his personal account and $15,000 used to create three trustee accounts of $5,000 each for three children. (R. 158-168, 243-245, 295-296, 427-429, Ex. 17, 18, 19, 21.)

Also included as an asset at the end of 1945 was cashier's check No. 25104696 for $7,724 payable to the Army-Navy Store, bearing appellant's endorsement. (R. 420, Ex. 34.) This check was purchased on November 19, 1945 and was outstanding at the end of the year, being paid by the bank on March 27, 1946. (R. 338-341.)

Also included in appellant's assets were United States Treasury bonds 2½% 1959-62 series, purchased by him for $25,000 in 1945 and in appellant's possession at the end of each year 1945 and 1946. (R. 425.) Appellant claimed $20,000 of these bonds to be the property of his mother, who died in 1951 prior to the first trial. (R. 221-222, 457, 732-745.) He reported the interest on these bonds in his 1947 tax return. (R. 744.) He was unable to state whether the interest of $1,720.17 reported on his 1946 tax return included the amount received for the bonds in question. (R. 744-745; 835-837.)

Whiteside testified that he had attempted to ascertain the ownership of the bonds by analysis of the mother's bank accounts, and could find no transfer of

any funds previous to the date of the purchase of the bonds in an amount sufficient to account for the $20,000 appellant alleged he had received from his mother and used to purchase the bonds. (R. 483-484.) The bonds were purchased with cashier's checks, which in turn were purchased by appellant with currency. (R. 484-485.)

Appellant's sister, Terrance Olender Gambord Glick, who was co-executor with appellant of the mother's estate, filed a Federal Estate Tax Return on December 15, 1952 in which was itemized stocks and bonds belonging to the estate. The $20,000 in government bonds was not included in the inventory. (R. 485-490, 552, 813-814, Ex. 52.)[6] When first questioned by Agent Root, appellant said the money for purchase of the bonds was from earnings of the Army-Navy Store. (R. 98-99.)

It was stipulated that appellant had non-deductible personal expenses (exclusive of income taxes paid) of $2,739.38 during 1945 and $6,659.07 during 1946. (R. 140, Ex. 11, 11a.) Other expenditures, primarily clothing, were established at trial of $125.49 for 1945 and $4,335.04 for 1946. (Ex. 50.) Thus the total of his living expenses included in the final net worth computation was 1945—$2,864.87; 1946—$10,994.11. Considering the scale on which appellant lived, these

[6]Even assuming that the $20,000 in bonds was the property of appellant's mother, his 1945 tax liability would have been $16,484.71 as compared with the $7,931.86 he reported, or a difference of $8,552.85. Appellant's wife's tax liability, likewise, would be the difference between $7,563.89 reported and $16,044.62 owed. Together their unreported tax was $17,033.58 after crediting the $20,000 as being the mother's property. (R. 481-482.)

amounts are purely nominal. (R. 355, 382-389, 688.) An insurance policy taken out in 1946 carried a personal property floater with coverage of $64,850. (R. 352-355.)

Treasury Currency Reports, made by the Bank of America, Oakland main office, reflected currency transactions with appellant as follows (R. 310-312, Ex. 29):

November 9, 1945 a check for $25,000 was cashed and currency given of 250 $100 bills;

November 20, 1945 a deposit of $25,000 consisting of 250 $100 bills;

December 5, 1945 two cashier's checks for $10,000 and $15,000 respectively, purchased with currency. (Used to purchase war bonds.)

January 14, 1946 $50,000 in currency used to purchase war bonds;

May 29, 1946 a cashier's check purchased with $3000 currency;

September 19, 1946 cash deposits of $1000 in $100 bills and $1,500 in $20 bills.

In addition, the record is replete with evidence of cash dealings of various sorts. (e.g. R. 319, 325, 466-468, 668, 678.)

Whiteside testified that the only "leads" or information given by appellant during the course of the investigation was the information contained on the net worth statement. In the course of verifying this information he learned of additional assets not disclosed by appellant; and included them in his statement, and

ıe followed all leads as to the sources of his income ınd the items of assets and liabilities. (R. 404-409.)

Whiteside also explained the manner of prepara- ion of the net worth statement (Ex. 50) and the ources of the items listed thereon. (R. 412-442.) With he exception of the items objected to by appellant, uestionable or non-provable adjustments were made n appellant's favor. (e.g. R. 413, 416-418, 420-421, 41-442.) For example, the living expense figures in- lude less than $300 a year for food. (R. 434.)

Appellant's net worth as of December 31, 1944 was hus computed to be $198,905.09, and at end of 1946 o be $283,193.62. (R. 431.) Upon the basis of the ıet worth increase plus nondeductible expenditures, ıppellant's true income was computed, as follows (R. 31-437):[7]

Year	Net Income	Reported	Unreported
945	$87,999.24	$41,067.61	$46,931.63
946	43,212.53	23,514.62	19,697.91

The defense: The object of the defense was to show hat the government's net worth computation was in rror:

(a) by failing to credit him as of December 31, 1944 vith over $70,000 cash in vault at the end of 1944, nstead of the $50,000 claimed by the government;

(b) by failing to credit him as of December 31, 1944 vith sailor suits costing $20,550, on hand at the end

[7]Since appellant's returns were filed on the community property basis, these figures should approximately be halved for the purpose of the indictment.

of 1944, but not included in store inventory, and sold in 1945 and 1946;

(c) by including in his assets as of December 31, 1945 and 1946 bonds costing $20,000 in 1945, which he was holding for his mother; and

(d) by including in his assets as of December 31, 1945 a cashier's check for $7,724 purchased in 1945 and cashed in 1946.

(a) *The currency on hand.*—Appellant testified that in April, 1944 he and his attorney, Monroe Friedman, visited his safe deposit box No. 56 and arranged for Friedman's name to be recorded with the bank as a joint tenant so he would have access to the box during appellant's absence on a trip to San Antonio, Texas. At that time appellant counted the money, consisting of mostly $100 bills, and there was $75,000 in currency in the box. (R. 569-573.) He did not keep a record of currency in the vault, and could not recall any having been made on this occasion; nor could he recall the amount in the box in January, 1944, when he had removed $20,550 to purchase the Goodman cashier's checks. (R. 669-700.) Appellant testified he had the money in the box since 1942, when he had put in at least $75,000 which he obtained in currency from his father between 1930 and 1940. (R. 700-701, 707, 708.) $45,000 of the sum was in gifts. (R. 708, 726.) Appellant's father died on June 18, 1940. (R. 709.) Prior to 1942 appellant had kept the cash in a vault and safe in the Olender Building in Fresno. (R. 708.) Appellant's mother was executor of the father's estate,

and knew of the gifts. (R. 708.) Appellant also did some work in connection with the estate tax return filed for his father's estate and admitted that none of the $75,000 was reported thereon as a transfer during decedent's life. (R. 711.) Appellant prepared his father's tax returns from 1930 to 1940 (R. 725-726) and knew his father was borrowing money in that period. (R. 727.)

Appellant said he used none of the $75,000 in 1942 or 1943. (R. 711-712.) In 1944 he removed $20,550 in January to purchase the Goodman checks; $1,500 on June 27 for deposit to his personal bank account; $1,500 on July 17 for deposit to the Olender-Alkus bank account; $3,000 in December to purchase merchandise from Barney's in Los Angeles; and $8,000 for purchase of Treasury bonds on December 16, 1944 might have come from the vault since appellant's bank accounts showed no such withdrawal. (R. 712-714.)[8]

He claimed over $70,000 in the safe deposit box at the end of 1944. He kept no record and could not explain how he fixed this figure, but he "just knew it was there." (R. 715.) He could not remember the amount on hand at the end of 1945 and said it was all gone at the end of 1946. (R. 715-716.) Later he said there was cash on hand at the end of 1946, but he did not know how much. (R. 718.)

He identified his handwriting on Exhibits 17, 18 and 21 in which lesser amounts of currency are

[8]Even assuming $75,000 on hand in April, 1944, the subsequent withdrawals reduce the amount during the year by $14,000.

claimed, but could not remember the last document (Ex. 21), or explain where the figures of lesser cash on hand originated. (R. 717-723.)

He did not report the currency in his declarations of personal property tax filed with Alameda County Assessor during 1941 through 1946. (R. 728.)

Monroe Friedman testified that he had accompanied appellant to the bank on April 22, 1944 to place the safe deposit box in their joint names, and that appellant had counted the currency and it amounted to two or three hundred dollars more than $70,000. (R. 500-503.) On May 5, 1944 Friedman's name was removed from the record of ownership of the safe deposit box and the box was looked at, but the money was not counted. (R. 503.)

(b) *The sailor suits:*—In January, 1944 appellant purchased with currency a series of cashier's checks totaling $20,550 and made payable to George Goodman.[9] (R. 55, 585.) He gave or mailed the checks to Louis Leavy[10] to buy small size sailor suits in lots of 100 at $22.50 or $23.50 each from Goodman. (R. 585-588.) In January, February and March, 1944 appellant received approximately 822 sailor suits in cartons marked "Seagoing Uniform Company," and when opened he discovered that the suits were mismarked as to size. (R. 588-590.) He complained to Leavy that he could not sell the suits because they were large sizes, and he put them in his basement. (R. 590-591.) The

[9]Goodman was dead at the time of the trial (R. 848).

[10]Sometimes spelled Levie in the record.

822 suits were not included in 1944 year-end inventory. (R. 597.) In 1945 Leavy sold 200 of the suits for appellant to Lerman for $5,000, which was deposited in the store bank account and entered as a capital investment on the books. (R. 591-594.) Later in 1945 Leavy sold an additional 280 suits in small lots for approximately $7,000 which Leavy retained and used to purchase suits for appellant from Moe Suraga in New York. (R. 595-599.)

About 20 suits were sold to individual customers in 1945 and the remaining 322 were taken into inventory at a cost figure of $24.50 each at the end of 1945 and sold in 1946 or later. (R. 595-597, 765.)

On cross-examination appellant admitted he had arrived at the figure of 822 suits by dividing $20,550 by $25 a suit. (R. 750.) Appellant personally counted the goods in inventory at the end of 1944 and 1945. (R. 753-756.) The 822 sailor suits were in basement No. 1. (R. 753.) The 1944 year-end inventory shows a total of 110 sailor suits in the store, and includes a page for items located in basement No. 1, but no sailor suits are recorded in that location. (R. 758-763, Ex. 60.) The 1945 year-end inventory shows 322 suits in basement No. 1 at $24.50 each. (R. 765, Ex. 61.) These suits were not included in the inventory contained in the 1945 tax return. (R. 774.) The 1946 year-end inventory showed 44 sailor suits on hand, so that the 322 suits had been largely disposed of in that year. (R. 776.)

Leavy corroborated appellant's story to some extent, but admitted that the invoice he sent to Lerman with

the 200 suits showed they mere mostly *small* sizes. (R. 870-871, Ex. 53.)

(c) *The Ownership of $20,000 U. S. Government Bonds:*—Appellant testified that he purchased $25,000 of U. S. Government 2¼, 59-62 bearer bonds on December 5, 1945, of which $20,000 belonged to his mother. (R. 555.) He retained possession of them until he ordered their sale in 1953. (R. 565.) In 1947 he reported the interest from them on his income tax return. (R. 569, 744.) He clipped the interest coupons. (R. 736.) He ordered the sale of the bonds. (R. 736.) The money used to purchase the bonds was given to him at different times, $10,000 in July, 1944 and the balance of $10,000 in one or two other occasions later in 1944 or early 1945 or before November or December 1945. (R. 732-733.) The money was given to him to use any way that he desired. (R. 734.) The bonds bore no identification as to ownership, but were placed in an envelope with the mother's name on it. (R. 735-736.)

(d) *The Cashier's Check for $7,724:*—This check (Ex. 34) was drawn payable to the Army & Navy Store, endorsed by Army & Navy Store, M. Olender, to the order of Louis Leavy; then endorsed again "M. Olender," then "Louis Leavy" and finally "M. Saraga." The check had its origin in the sale of 280 sailor suits by Leavy to various unnamed customers, the proceeds of which sales Leavy had taken to New York to use for purchase of additional suits for appellant. (R. 795.)

Appellant admitted that if he did not have the check n his possession at the end of 1945 he had an account eceivable from Leavy or a deposit in an advance with Saraga. (R. 795-796.) He "assumed" it was an asset t the end of 1945. (R. 796.)

THE GOVERNMENT'S REBUTTAL.

Appellant testified repeatedly that he had received nly 822 sailor suits from Goodman in 1944 in exhange for the $20,550 cashier's checks (R. 585, 750, 57); and that the shipments were received in Janary, February and March, although there could have een some a little later, a month or two. (R. 750.) Ie also testified that the suits were marked with small izes, but were actually large sizes that he could not ell. (R. 588-589.) He identified the suits as coming rom Seagoing Uniform Corporation. (R. 751.)

In rebuttal, John Sanchirico, executive vice-presient of Seagoing Uniform Corporation since 1940 and ccountant for the firm prior thereto, produced and dentified invoices and shipping memorandums kept y the company in the regular course of its business. R. 889-899, Ex. 66-71.) He explained that in 1944 nd 1945 Goodman supplied cloth for uniforms, and hat Seagoing did the manufacturing, with each party etting one-half of the finished product. (R. 872-893.) Goodman's share of the finished product was shipped rom Seagoing's plant, pursuant to Goodman's inructions. (R. 895.) Goodman furnished the shipping abels indicating the consignee. (R. 895, 911.)

Seagoing's employees hand wrote a shipping memorandum indicating the number of garments involved, and the name and address of the customer, at the time the goods were shipped. (R. 895.) The shipping memorandums show a total of 933 suits shipped in the first six months of 1944. (R. 896-903.) Of this total, 430 were shipped in June. (Ex. 69, 70, 71.)

The greatest range in sizes was from size 36 to 44 during 1944, and sailor suits were in great demand in any size. (R. 903-904.)

SUMMARY OF ARGUMENT.

I.

The evidence adduced by the government was manifestly sufficient to support the verdict of guilty. What appellant asks is that this court reweigh the evidence and accept as true his own largely uncorroborated testimony. It is well settled this court will view the evidence in the record in the light most favorable to the government, and that it will not judge the credibility of witnesses or reweigh the evidence.

II.

The rebuttal testimony of John Sanchirico and admission of the exhibits he identified and introduced, was proper to impeach appellant on a material issue in the case, and the records were admissible as allowed by this exception to the hearsay rule, and pursuant to Title 28 United States Code, Section 1732.

ARGUMENT.

I.

THE EVIDENCE WAS AMPLY SUFFICIENT TO SUPPORT THE VERDICT AS TO EACH COUNT.

A. Scope of Appellate Review of Sufficiency of Evidence.

Appellant contends that the evidence was insufficient to support the verdict.[11] Actually what he asks is that this court review the evidence and accept as true his own largely uncorroborated testimony.

It is a well established principle that this court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.C.A. 4th);

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[11]In this section we deal with appellant's first five Specifications of Error (Br. 56-59) and the first two points of his argument. (Br. 59-84.)

Gendelman v. United States, 191 F. 2d 993 (C.C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.C.A. 9th), cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F. 2d 122, 124 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C.C.A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.C.A. 9th).

Despite these well settled principles of appellate review, appellant's first points of argument (Br. 59-84) are little more than a recital of testimony by defense witnesses in the light most favorable to the defense. The thrust of his argument is directed at the claim that the opening and closing net worth for each year was not established to a reasonable certainty, or in the alternative, that it failed to reflect unreported income. (Br. 59, 78, 83.)[12] Cf. *Campodonico v. United States,* 222 F. 2d 310 (C.A. 9th).

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[12]Appellant also suggests in passing, although he apparently does not rely upon the claims: (a) that the government failed to follow leads supplied by him as to cash on hand (Br. 65, 80); (b) that there was no proof of a likely source from which it could reasonably be found the net worth increases were derived. (R. 79.)

As to (a) supra, the first knowledge to the government that he disavowed the $50,000 cash figure and claimed $70,000 cash as of December 31, 1944, came at the first trial of this case. (R. 463.) Obviously, this is not the kind of lead which *Holland v. United States,* 348 U.S. 121 requires to be investigated. Otherwise, a trial must be adjourned each time a defendant testifies in his own behalf in order that the truth of his statements may be verified or disproved. The Supreme Court makes it clear that where relevant leads are not forthcoming, or the leads are not reasonably susceptible of being checked, the government is under no duty to negate every possible source of non-taxable income. *Holland v. United States,* supra, at pages 135-136. Moreover, the trial court fully instructed the jury as to the effect of the government's alleged failure to run down leads. (R. 936-937.)

As to (b) supra, *likely* sources *were* proved at the trial. The Army and Navy store business and the unrecorded deals in uniforms were themselves sufficient to meet this requirement even without regard to the various other business interests of appellant. In any event, the *Holland* case does not require the precise

B. The Evidence of Net Worth Increases.

To convict one of tax evasion under Section 145(b), the Goverment must prove that there is a tax owed to it by the defendant and that he has done acts of evasion with a specific intent to defraud the United States. Here there is no question that acts of evasion were done. The sole issue is whether the appellant owed a tax to the United States.

The argument that the extensive evidence, including stipulations, of the appellant's financial affairs, is too insufficient to establish his net worth increases brings into sharp focus the effort to show ultimately that tax evasion must be immune against detection and proof by circumstantial evidence.

Bizarre on its face (though to be sure, not impossible), appellant's belated story that he had $70,000 in hidden cash on December 31, 1944 was obviously not subject to disproof by direct evidence. The investigators could not reach back in time to inventory the contents of his vaults and safe deposit boxes. Now appellant asserts that his tardy assurances that he had larger sums of money than originally claimed should be sufficient to destroy the effectiveness of the government's proof. If the argument were sound, a large number of tax investigations and trials would begin

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sources to be shown. It is sufficient if there was proof from which the jury could reasonably find the net worth increases sprang. This court stated in *McFee v. United States* (C.A. 9th 1953), 206 F. 2d 872, 874, cert. denied, 347 U.S. 927, order denying certiorari vacated 347 U.S. 1007. "The law is clear that proof of the exact amount or precise source of unreported income is not required." *Jelaza v. United States* (C.C.A. 4th 1950), 179 F.2d 202; *Gariepy v. United States* (C.C.A. 6th 1951), 189 F.2d 459.

nd end with the taxpayer's bland claim of bags of oarded currency from some convenient time in the ast.

That the argument is unsound is attested by the reat number of cases in which evidence of the kind dduced here has served as a part of the Government's ase.[13]

We submit that the Government's evidence manifestly supports the net worth computations and the erdict of guilt. Appellant's large unrecorded deals ith Goodman justify the use of the net worth method f computing taxable income for the years involved. Moreover, the Goodman deals (shown by Sanchirico's estimony to have been greater than what appellant dmitted) considered in conjunction with the use of ashier's checks and currency, indicated a probable lack market source for the unreported income. Cf. *Inited States v. Chapman,* 168 F. 2d 997, 1000 (C.A.) cert. denied, 335 U.S. 853.

The items in the net worth statement (Ex. 50), including the annual inventories of merchandise in the tore, were derived largely from the stipulations. (Ex. 1-11A.) In addition, the government, relying on appellant's admissions to Ringo in the early stages of the

[13]E.g., *Smith v. United States,* 210 F.2d 496, 500 (C.A. 1), certiorari granted, 347 U.S. 1010; *Pollock v. United States,* 202 F.2d 281, 284 (C.A. 5), certiorari denied, 345 U.S. 993; *Fariepy v. United States,* 189 F.2d 459, 461-462 (C.A. 6); *United States v. Potson,* 171 F.2d 495, 498 (C.A. 7); *Schuermann v. United States,* 174 F.2d 397, 399 (C.A. 8), certiorari denied, 338 U.S. 831; *Barcott v. United States,* 169 F.2d 929, 931-932 (C.A. 9), certiorari denied, 336 U.S. 912; *Graves v. United States,* 192 F.2d 579, 584 (C.A. 10).

case, allowed $50,000 cash in the safe deposit boxes as of December 31, 1944 (R. 427-429, Ex. 10, 17, 18, 19, 21) of December 31, 1944 (R. 427-429, Ex. 10, 17, 18, 19, 21); and the government charged appellant with ownership of the $20,000 in Treasury Bonds which were in his possession in 1945, on which he reported the interest in his 1947 income tax return and over which he exercised control (R. 425);[14] and with ownership of a cashier's check for $7,724 on hand at the end of 1945 and cashed in 1946. (R. 420.)

Assuming $50,000 cash at the starting point, the government's computation establishes unreported income of $46,931.63 for 1945 and $19,697.91 for 1946. The trial judge, however, instructed the jury. (R. 926-927):

> "In many net worth cases the government relies on the taxpayer's statements made during the course of a government investigation in order to establish vital links in the government's case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the gov-

[14] Appellant's 1946 income tax return reported interest income of $1,720.17 from bonds—an amount sufficient to include the interest on the $20,000 Treasury bonds in question. He was unable to explain how he arrived at this interest figure, although he prepared his own return, and he had no work sheet to show his computations. (R. 744-745, 830, Ex. 3.) Unless appellant had additional income during 1946 the only source from which a large portion of this bond interest could be derived was the Treasury bonds he claimed to be his mother's.

ernment's case be corroborated. In this connection, the $50,000 cash item and the $7,200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath."

The effect of this instruction was to remove from the jury's consideration the $50,000 cash on hand figure for December 31, 1944 and substitute the appellant's judicial admission of $70,000. (R. 715.) We believe the court erred in so instructing the jury, since it overlooked the fact that there was ample corroboration of the *corpus delicti* in the fact that the appellant was enjoying excessive net worth increases during the prosecution years at the same time he was receiving unrecorded amounts of income. *Smith v. United States,* 348 U.S. 147; *United States v. Calderon,* 348 U.S. 160. The instruction was, therefore, more favorable to appellant than he deserved.

While the Supreme Court in *Smith v. United States,* supra, at page 156 speaks of the requirement of corroboration for all "elements of the offenses established by admissions alone", nowhere does it appear to require corroboration of each individual entry on an incriminating net worth statement. The amount of currency on hand is not an element of the offense to be established by independent evidence or corroborating admissions, any more than the value of other assets claimed by appellant on the same document and

adopted by the government as true without independent corroboration and which remain unchallenged.[15]

It must be assumed the jury followed the instructions of the court and credited appellant with $70,000 at the end of 1944, rather than $50,000. Since some $46,000 unreported income remained (even without regard to whatever amount of cash on hand appellant admitted having as of the end of 1946) and since the opening cash on hand was clearly fixed by judicial admission, there was substantial evidence of tax evasion. This court "can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for judgment of acquittal has been overruled". *United States v. Calderon,* supra, p. 164. The Supreme Court in the *Calderon* case, in almost identical circumstances of dispute as to the defendant's conflicting claim of cash on hand, went on to say:

> "Even more conclusive corroboration, however, is respondent's testimony at the trial that he had $16,000 or $17,000 cash on hand at the starting point. This conflicted with the statements being corroborated ($500) and respondent's testimony at a prior trial ($2000 to $9000), but for the purpose of independently establishing the crime charged the jury could accept this testimony. Respondent further testified that he had $3,000 or $4,000 in cash at the end of the prosecution period. Taken together with the remainder of

[15]For example, cash in store register of $2,500 at the end of 1944 and reduced to $1,000 by the end of 1945; valuation of household furniture, value of real estate, and amount of nondeductible expenditures. (Ex. 50.)

the net worth statement, which was stipulated or independently established, this testimony establishes a deficiency in reported income of more than $30,000 (footnote omitted). There could hardly be more conclusive independent evidence of the crime."

Moreover, as this court properly pointed out in *Wendelman v. United States,* 191 F. 2d 993:

"While the government had the duty to prove guilt beyond a reasonable doubt, it was not required to prove the exact amounts of unreported income. Skillful concealment can not be made an invincible barrier to proof. *United States v. Johnson,* 1943, 319 U.S. 503, 517. Proof of the amounts of the appellant's income need not measure up to the amount stated in the indictment. *Gleckman v. United States,* 8 Cir. 1935, 80 F. 2d 394, certiorari denied 297 U.S. 709. What is necessary to take a case of this kind to the jury is a showing that a taxpayer had income which he deliberately failed to include in his return. *Schuermann v. United States,* supra, at page 399. Whether such a showing had been made at the close of the government's case was to a great extent dependent upon the credibility of the government's witnesses."

The independent evidence, the stipulation and the ppellant's judicial admissions, taken together estab- sh a substantial deficiency. Assuming a criminal in- ent to evade tax, which appellant does not deny, that s all that is necessary to support the government's ase.

Appellant goes on, however, to attack the weight f the evidence as to other assets included in the

computations. To be sure, the testimony concerning the ownership of the $20,000 worth of government bonds was in conflict. The evidence produced to establish appellant's purchase, possession and control of the bonds was ample to justify the jury in finding that they were his property. He purchased them with cashier's checks, which in turn had been purchased with currency. (R. 555, 733-736.) They were in his possession during all of the period from purchase to sale. (R. 565.) He clipped the interest coupons. (R. 736.) He reported the interest earned on these bonds in his 1947 tax return (R. 569, 744) and there is some justification for believing that he likewise reported the interest in his 1946 return. (See footnote 14 supra.) When the bonds were sold he gave the order of sale. (R. 736.) The bonds were not reported on the estate tax return filed by appellant's sister, who was co-executor with him of the mother's estate. (R. 740-742.) Subsequent to the first trial appellant filed a supplemental inventory in which the $20,000 in bonds was disclosed for estate tax purposes for the first time. (R. 740-741.) (Ex. P.)

The critical issue was appellant's credibility and the jury having determined this issue against him, he seeks a reweighing of the evidence by this court.

Likewise, the number and value of sailor suits on hand at the end of 1944 and 1945 is challenged by appellant. The inventory records of appellant's business at the end of each year, 1944, 1945 and 1946 were made by him personally. (R. 753-756.) He concedes that the 822 suits he claimed on hand in

basement No. 1 were not included in the 1944 year-end inventory. (R. 597.) He claimed that the suits were unsaleable because they were large sizes. (R. 588.) Nevertheless, he states that 322 suits of this nature were taken in inventory at the end of 1945 and he had no difficulty in selling most of them in 1946. (R. 597.) Leavy sold approximately 480 of these suits in 1945 for around $12,000 which was not recorded as income on appellant's books, the first $5,000 being shown as a capital investment by appellant (R. 594), and the remaining $7,000 being retained by Leavy and used for the purchase of other merchandise from Suraga. (R. 595-599.) Leavy kept the proceeds of these latter sales over a period of several months and was unable to remember the names of any of the customers purchasing them. (R. 875-878.)

Once more, the critical issue was the credibility of the defense witnesses and there was ample evidence to justify the jury's rejection of the appellant's claim.

Appellant also objects to inclusion in his net worth at the end of 1945 of a cashier's check for $7,724. (Exhibit 34.) The check was issued on November 19, 1945 to the Army and Navy Store and was not cashed until March 27, 1946. Appellant admitted that he was entitled to the proceeds of the check and that he eventually received the benefit of it in 1946. The check was included as an asset since it constituted either cash or an account receivable at the end of 1945. (R. 420.) However, even it be assumed *ar-*

guendo that appellant's contention concerning this check is correct, the amount involved could not affect the result. An income and tax liability would remain outstanding even if the check be eliminated from the net worth statement. "The government is not required to prove the defendant's guilt to a mathematical certainty." *Schuermann v. United States,* 174 F. 2d 397 (8th C.A. 1949) quoted by this court with approval in *McFee v. United States,* 206 F. 2d 872.

There can be no doubt that there was evidence that appellant owned the $20,000 worth of bonds; that he had no sailor suits in basement No. 1 on December 31, 1944; that he had insufficient cash on hand to account for his net worth increases; and that his net worth plus expenditures amounted to more than his reported income in the prosecution years. And "when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable". *Lavender v. Kurn,* 327 U.S. 645, 653, quoted in *Shebley v. United States,* 9th Cir., No. 14,465, decided March 19, 1956.

This court recently disposed of a similar claim of insufficiency of evidence in the tax evasion case of *Elwert v. United States,* No. 14,846, decided March 22, 1956, in the following language:

"Here, as in most tax evasion cases, much of the Government's evidence is circumstantial. The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence.[5] If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits,[6] this court applies no special rule to review circumstantial evidence on appeal as to circumstantial proof of intent see this court's in banc decision in McCoy v. United States, 169 F.2d 776 (Cir. 9), cert. denied 335 U.S. 898 (1948)." (Footnotes omitted.)

ıe motion for judgment of acquittal was properly ·nied at the close of the evidence, and there was sub-antial evidence on which the jury could base its rdict of guilty.

Net Worth Increases in 1946.

In point two of his argument (Br. 83) appellant ntends that the failure to prove the opening net ɔrth on December 31, 1944 to a reasonable certainty, d the elimination of the $7,200 cash on hand figure the end of 1945, renders the computations as to 46, on which counts three and four are based, in-finite, uncertain and insufficient to establish the arges.

Assuming $70,000 cash on hand at the end of 1944, e net income understatement for that year still gregates approximately $26,900 and leaves no cash

in the box at the end of 1945. To the extent that cash remained on hand at the end of 1945, the understatement of income during the year is increased, for if the increase in net worth did not come from cash on hand it must be from current earnings. Conversely, if appellant had no cash on hand at the end of 1945, the computations of the government allow him the undeserved advantage of the $7,200 originally claimed by him. In other words, the cash on hand in the largest amount ever claimed by appellant is completely absorbed by his understatement of income in the first prosecution year, 1945, leaving him with a zero balance at the beginning of 1946. The jury was justified in considering this prospect in the light of the evidence of net worth increases during the period. Again, to the extent that he had remaining cash at the end of 1946 his net income is greater than charged, for he is assumed by the government's computations to have exhausted his hoard.

The Supreme Court disposed of a similar situation in the *Calderon* case, supra. There the defendant claimed at the trial he had $16,000 or $17,000 cash on hand at the starting point. Even accepting his testimony, a deficiency of $30,747 remained. After holding that the defendant's testimony could be taken together with the remainder of the net worth statement to establish a deficiency and supply the needed corroboration, the court went on to say at page 168:

> "But one problem remains. The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years, and respondent was convicted on all

four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. Independent evidence that respondent understated his income by $30,000 in the same four-year period for which respondent's extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration. It provides substantial evidence that the crime or crimes of tax evasion have been committed; the corroboration rule requires no more."

The facts here are even less favorable to appellant ıan in the *Calderon* case, for there the cash on hand ›uld have absorbed the computed income deficiency, 'hereas in the case at bar the computed income deciency in the first prosecution year absorbs all the lleged cash on hand and an understatement of in›me still remains.

II. THE REBUTTAL TESTIMONY OF JOHN SANCHIRICO WAS PROPERLY ADMITTED.

One of the critical factual issues in the case was the umber of sailor suits sold by appellant. His claim

of 822 sailor suits unrecorded in his inventory would, if true, entitle him to the same credit for these undisclosed assets as if he had undisclosed currency. In order to impeach his credibility and to refute the claim that he had only the transactions with Goodman reported by the $20,550 in cashiers' checks, and one later transaction of $1,380 (R. 757-758), Sanchirico was called to testify to transactions involving some 933 sailor suits in the first six months of 1944.

Appellant contends that Sanchirico's testimony and the records produced were hearsay and not proper rebuttal. He cites no authority. The propriety of the evidence as rebuttal testimony to impeach appellant on a central issue appears too clear to require argument. This was contradiction of the appellant on a matter vital to his defense, and was properly allowed as rebuttal testimony.

To be sure, the records produced were hearsay, but they fall within the accepted exception of the hearsay rule relating to shop books kept contemporaneously with the transaction entered, and maintained in the ordinary course of business. While the testimony of Goodman would have been the best evidence, these records were clearly admissible when it was shown that Goodman was dead. (R. 848.) Moreover, any doubt as to the admissibility of such records should be resolved by reference to Section 1732, Title 18, United States Code, making admissible such records when made in the regular course of business.

Arena v. United States (C.A. 9) 226 F. 2d 227, 234.

See also:

Wigmore on Evidence (3d Ed. 1940), Volume V, Section 1530;

Olender v. United States, 210 F. 2d 795 (C.A. 9th);

Finnegan v. United States, 204 F. 2d 105, cert. den. 346 U.S. 821, rehearing denied 346 U.S. 880.

"In reviewing a judgment in an appellate court, ıe burden is on the plaintiff in error to show that ror in the admission of testimony was prejudicial. *impson v. United States,* 289 Fed. 188, 191. No ıch showing has been made here." *Ryno v. United tates,* 9th Cir., No. 14,793, decided April 10, 1956.

CONCLUSION.

Appellant was properly convicted on evidence gally admissible and amply sufficient to support the erdict. The judgment of conviction should be af-rmed.

Dated, San Francisco, California,
June 4, 1956.

Respectfully submitted,
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